STATE OF MICHIGAN

COURT OF APPEALS

TOWNSHIP OF CLEMENT,

Plaintiff-Appellee,

v

RUDOLPH R. SHELTROWN,

Defendant-Appellant.

UNPUBLISHED
July 12, 2005

No. 261098
Gladwin Circuit Court
LC No. 04-1603-CE

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals as of right an order granting plaintiff summary disposition and ordering defendant to cease the complained of operations. We affirm.

Georgeanna Mackey, a named codefendant at trial, owned two parcels of property in Clement Township known as 552 E. M-30, and 487 Adeline Drive. According to neighboring landowners, in April 2004, they observed defendant bury a lot of building debris, including broken concrete, at 487 Adeline Drive. According to the township supervisor, defendant stored old mobile homes, inoperable motor vehicles, "junk, machinery, machine parts, an old boat, an old white truck with 'junk wanted' painted on its side . . . piles of brick, block, stone, steel, wood, metal [and] used building materials" at 552 E. M-30 as well as two locations owned by others. The supervisor claimed that the township had asked defendant to correct various code violations on several occasions, but defendant refused to do so.

Plaintiff filed a complaint alleging that defendant's operations violated the zoning ordinance because the property at 552 E. M-30 was zoned C-1 and junkyards were not permitted in the C-1 district, and the property at 487 Adeline Drive was zoned R-1, which did not permit landfills. The complaint also alleged that defendant's operation of a junkyard at 552 E. M-30 violated the township's blighted structure ordinance, its inoperable vehicle ordinance, and its junk ordinance. The complaint sought to enjoin defendant from further operations; to compel him to remove the inoperable vehicles, the buried items, the rubbish and trash; and sought attorney fees. As an affirmative defense, defendant claimed he had a veteran's license that permitted him to peddle his merchandise.

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10). In his objection to summary disposition, defendant argued that the ordinances were ex post facto in nature because he had been running his business since 1997, and his veteran's license permitted him to

sell his merchandise in Michigan. At the hearing, plaintiff argued that there was no reason to try the case because there was no issue of fact; defendant admitted he was selling junk, which was not permitted in a C-1 district. Moreover, the possessor of a peddler's license was still required to comply with police regulations. Plaintiff argued that the ordinance was not an ex post facto law because it was enacted in 1992, defendant began his operations in 1997, an ex post facto law punished an act that was legal when it was done, and the zoning and regulatory ordinances only punished what defendant had done since the ordinances were enacted.

In response, defendant argued that he had been operating in some capacity since 1989 and had only purchased the recycling portion of his business in 1997. Defendant argued that the township updated its proposed master plan and rezoned to deliberately target him after the court found that the county did not have the authority to discontinue his business. He claimed that the ordinances were ex post facto because his activities were not illegal when he purchased the property to continue his business. He claimed that the ordinances violated his right to contract because he contracted to buy the property relying on the business that had been running on the property. The court noted that defendant might have had a "grandfathered in situation" with respect to the zoning ordinance, but questioned whether it would apply to the regulatory ordinances. Defendant complained that the law was not being applied uniformly; the I-1 zoning district permitted a junkyard and his property had been rezoned; moreover, another junkyard was permitted to operate on property zoned R-1. He also asserted that plaintiff prevented him from complying with the ordinance when plaintiff denied his application for a permit to build a fence and pole barn.

Plaintiff pointed out that defendant's reply to the summary disposition motion only indicated defendant ran the business since 1997, but defendant was now claiming, without supporting evidence, that he had run the business since 1989.[1] The court asked defendant whether he intended to file a contrary affidavit, to which defendant replied that the summary disposition motion tested the pleadings as well. Plaintiff disagreed, arguing that admissible evidence was required to establish an issue. Plaintiff acknowledged that the 1992 zoning ordinance was amended in 2002 but claimed that the sections pertaining to the C-1 classification were not amended, and defendant had not challenged the validity of the ordinance. Defendant argued that the junk ordinance was part of the proposed master plan that was not enacted.

The court found that defendant's operations violated the township's blighted structure ordinance, its inoperable motor vehicle ordinance, and its junk ordinance. The opinion did not mention plaintiff's zoning ordinance. The court found that defendant's peddler's license did not excuse defendant from complying with regulatory ordinances, and the ordinances did not operate as ex post facto laws because they were not retroactively applied. The proposed judgment submitted by plaintiff ordered defendant to cease all operations, remove all debris, comply with the regulatory and zoning ordinances, and pay plaintiff's costs.

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[1] The exhibits attached to defendant's objection to plaintiff's motion for summary disposition consisted of statutes with respect to a peddler's license, 1921 PA 359, his peddler's license dated February 10, 2003, and portions of a 1992 zoning ordinance – presumably plaintiff's – that pertained to the I-1 district.

Defendant first argues that the court erred by applying the township ordinances as ex post facto laws. We disagree.

This Court reviews de novo whether a law is ex post facto. *People v Westman*, 262 Mich App 184, 187; 685 NW2d 423 (2004). A trial court's decision on a motion for summary disposition is likewise reviewed de novo. *Belvidere Twp v Heinze*, 241 Mich App 324, 327; 615 NW2d 250 (2000). Ex post facto laws are constitutionally prohibited. *Westman, supra* at 186. A law is ex post facto in nature when it punishes as criminal an act committed before the law's effective date, which was legal at the time it was committed. *Id*; *People v Jackson*, 465 Mich 390, 402; 633 NW2d 825 (2001). "'Where an offense is of a continuing nature, and the conduct continues after the enactment of a statute, that statute may be applied without violating the ex post facto prohibition.'" *Westman, supra* at 188, quoting *People v Grant,* 20 Cal 4th 150, 159; 973 P 2d 72 (1999), quoting *People v Palacios,* 56 Cal App 4th 252, 257; 65 Cal Rptr 2d 318 (1997). Thus, the ordinances would not be considered ex post facto if applied to defendant's operations that continued after the ordinances were enacted.

The unopposed affidavits of the township supervisor and neighboring landowners established that defendant's operations were occurring in August and April 2004 respectively. Moreover, the blighted structure ordinance, 51-2000 and inoperable motor vehicle ordinance, 52-2000, indicate that they were enacted in October 2000. There is no documentary evidence in the record when the junk ordinance, 53-2000 was enacted.[2] Presumably, it was enacted sequentially with the other ordinances and, thus, was enacted in 2000, but there is no evidentiary support for this presumption, and defendant argued that it was part of the proposed master plan that was not enacted. With respect to the zoning ordinance, plaintiff claimed that the ordinance was enacted in 1992. Defendant provided portions of what appears to be a zoning ordinance, which were dated 1992, but which did not apply to property zoned C-1. Plaintiff claimed without supporting evidence that the zoning ordinance was amended in 2000, but the provisions affecting property zoned C-1 were not amended. And defendant claimed that all he had was part of a proposed master plan that was never enacted.

Even if plaintiff failed to establish that defendant violated the junk and zoning ordinances after they were enacted, a law that addresses health and safety considerations rather than punishment is not ex post facto even though it may contain incidental punitive aspects. *Taylor v Secretary of State,* 216 Mich App 333, 341; 548 NW2d 710 (1996). Pursuant to MCL 41.181, a township may enact ordinances to regulate "the public health, safety, and general welfare of persons and property." And under MCL 125.271, a township may "provide by zoning ordinance for the regulation of land development and the establishment of districts" to, among other things, "promote public health, safety, and welfare." Therefore, because the ordinances were designed to address health and safety issues, they could not be ex post facto in nature.

Defendant next argues that the court, by failing to address the nonconforming use issue in its opinion, failed to rule on it. We disagree.

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[2] It is unclear why the junk ordinance is not in the trial record; the court clearly had access to the junk ordinance when it wrote its opinion.

Defendant never argued that his use was a nonconforming use. Therefore, this issue is unpreserved. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). The court's opinion did not refer to the zoning ordinance at all, but found that defendant's operations violated the various regulatory ordinances, and judgment was granted to plaintiff as stated in the opinion. A regulatory ordinance enacted pursuant to MCL 41.181 is not subject to the rights associated with nonconforming uses. *Natural Aggregates Corp v Brighton Twp*, 213 Mich App 287, 301; 539 NW2d 761 (1995), citing *Casco Twp v Brame Trucking Co, Inc*, 34 Mich App 466, 470-471; 191 NW2d 506 (1971). Whether an ordinance is considered regulatory or zoning in nature depends on whether the ordinance relates to the general zoning plan. *Id.* at 298. In other words, if the ordinance regulates an activity and "does not depend on a zoning or districting scheme," the ordinance is regulatory in nature. *Id.* at 300. The portions of the three ordinances quoted in the court's opinion do not refer to a districting or zoning scheme, but apply throughout the township. Therefore, the nonconforming use doctrine did not apply to the regulatory ordinances.

However, the nonconforming use doctrine does apply to zoning ordinances. *Natural Aggregates Corp, supra* at 301. "A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date." *Heath Twp v Sall*, 442 Mich 434, 439; 502 NW2d 627 (1993), citing *Dusdal v City of Warren*, 387 Mich 354, 359-360; 196 NW2d 778 (1972). However, defendant did not establish that he had a nonconforming use. To be a nonconforming use, the use must (a) be a vested right, (b) have pertained to a particular parcel of property and (c) have lawfully existed when the ordinance was passed. *Heath Twp, supra* at 439. In his brief objecting to plaintiff's motion for summary disposition, defendant asserted that he purchased the business and began operating it in 1997.[3] A mere intention to put property to a future use is insufficient to establish a vested right. *Id.* at 444-445. Therefore, defendant's purchase of the property in 1997 with the intention of running a recycling business did not establish a vested right.

Moreover, because defendant failed to establish that the business lawfully existed at the time the ordinance was passed, he did not meet the third requirement for a nonconforming use. *Heath Twp, supra* at 439. Although defendant claimed for the first time at the hearing that he had been in this type of business since 1989, the use had to be associated with a particular parcel of property. *Id.* According to plaintiff, after the court ordered defendant to cease operations at a different location, defendant merely moved his business to 552 East M-30 in 1997. Because defendant was required to show that the operations pertained to 552 East M-30, *id.*, and defendant did not provide a deed or affidavit indicating when he purchased the property, defendant failed to establish the second requirement for a nonconforming use as well. Because the burden of establishing a nonconforming use is on the property owner, *id.*, defendant never claimed he had a nonconforming use, and defendant failed to establish that a nonconforming use

[3] There is no documentary indication of what the business consisted at the time he purchased it or how long the business had been in operation before he purchased it. Moreover, it is unclear whether he purchased it; he admitted in his answer that the two parcels were owned by Mackey.

existed, the court did not err when it granted summary disposition without determining whether a nonconforming use existed. *Williams v City of Rochester Hills*, 243 Mich App 539, 547; 625 NW2d 64 (2000) (Summary disposition is properly granted when the nonmoving party fails to establish with documentary evidence the existence of a genuine issue of material fact that would preclude summary disposition).

Defendant next argues that the trial court denied him his right to operate under a veteran's peddler's license. A veteran who possesses a peddler's license need not obtain a permit to sell from a local municipality; however, the veteran must still comply with other municipal police regulations. *Williams, supra* at 559. Defendant admits that local ordinances must be complied with, but claims the ordinances could not legally be applied to him because they were ex post facto, and his use was grandfathered under the ordinance. Because defendant has not presented a new argument no further analysis of this issue is required.

Defendant next argues that the court erred in granting summary judgment. We disagree.

To the extent defendant argues in this issue that the trial court reached the wrong conclusion with respect to the ex post facto argument, the peddler's license defense, and the nonconforming use argument, these issues have already been addressed. Defendant's remaining arguments are (1) that he was not required to provide an affidavit when both parties agreed that the use was occurring, and (2) the court did not permit defendant to amend his pleading to reflect his developing argument while accepting copies of the ordinances from plaintiff the day after the summary disposition hearing without giving defendant an opportunity to object.

Although it is true that both parties agreed the use was occurring, a dispute arose with respect to when the use began. Defendant initially noted in his brief opposing summary disposition that his use began in 1997. However, at the hearing, defendant claimed that he had been operating in some capacity since 1989. In rebuttal, plaintiff claimed that defendant changed his argument in response to plaintiff's statement that the ordinance was enacted in 1992, and defendant was required to support his claim with an affidavit. The court asked defense counsel whether he intended to file a contrary affidavit. Defense counsel stated he had not filed an affidavit but that review of a summary disposition motion pursuant to MCR 2.116(C)(10) tested the pleadings as well.[4] *Id.*

Plaintiff's complaint alleged that defendant's operations violated numerous ordinances. Because the ordinances were a matter of public record, plaintiff was not required to attach the ordinances to its complaint. MCR 2.113(1)(a). There was no indication in the pleadings that defendant intended to challenge the validity of the ordinances, and defense counsel acknowledged at the hearing that he did not challenge the validity of the zoning ordinance. It was not until defendant's objection to plaintiff's summary disposition motion, which plaintiff's counsel indicated he received by fax the day before the summary disposition hearing, that defendant raised the ex post facto challenge. Hence, plaintiff had little notice that the validity of

[4] Nothing in the pleadings indicates when defendant's use began.

the ordinances – or the dates the ordinances were enacted, to the extent they would support an ex post facto or nonconforming use argument – would be challenged.

MCR 2.116(I)(5) and MCR 2.118(A), (C) and (D) permit amendment of the pleadings to conform to the evidence presented at a summary disposition hearing. MCR 2.118(A)(2) provides that the court shall freely give leave to amend when justice requires. And MRE 202(a) provides that, "A court may take judicial notice without request by a party of . . . ordinances and regulations of governmental subdivisions or agencies of Michigan." The cover letter accompanying the ordinances indicated that plaintiff was supplying them at the court's request. Because plaintiff was not required to supply the ordinance originally, issues raised at the last moment by defendant necessitated the amendment, defendant's approval was not required for the court to grant leave, MCR 2.118(A)(2), and the court had discretion to judicially notice the ordinances, there was nothing improper about plaintiff providing the court with the ordinances. Moreover, because defendant placed the matter at issue, he waived review of the ordinances' admission. *City of Troy v McMaster*, 154 Mich App 564, 570-571; 398 NW2d 469 (1986).

Citing MCR 2.116(C)(10)[5] and MCR 2.118, defendant claims the court failed "to state a justification for not allowing the Appellant to amend his pleading to reflect his developing argument." There was no indication in the record that defendant moved to amend his pleading. Moreover, an objection to a motion for summary disposition is not a pleading. MCR 2.110. In any event, the court noted in its opinion that defendant asserted as a defense that the ordinances were ex post facto. The court, in effect, allowed defendant to amend his answer to add the defense. Further, the court asked defense counsel whether counsel planned to file an affidavit, and counsel indicated an affidavit was not required. Therefore, defendant waived this issue. See *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 69; 642 NW2d 663 (2002) (voluntary and intentional relinquishment of a known right constitutes waiver of any error).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Donald S. Owens

[5] The proper subrule is MCR 2.116(I)(5), not MCR 2.116(C)(10).